

ASSOCIATION OF RESEARCH LIBRARIES

May 7, 1997

Peter N. Fowler, Attorney-Advisor
Office of Legislative and International Affairs
U.S. Patent & Trademark Office
Box 4
Washington, DC 20231

Dear Peter:

The Association of Research Libraries (ARL) participated in the Conference on Fair Use (CONFU) since its inception nearly two years ago. We appreciate the opportunity to have participated in this effort and believe it has provided a useful exchange of information among CONFU participants. Member leaders of the 120 ARL institutions have been provided regular opportunities to review working drafts of the proposals for educational fair use guidelines. Upon receipt of the December 1996 CONFU Interim Report, ARL circulated the final proposals to seek recommendations for possible endorsement. Based on review by our members, ARL concluded that it cannot endorse the proposals for distance learning, digital images, and educational multimedia guidelines. Moreover, the ARL Board of Directors affirmed that ARL should not endorse any copyright guidelines that they believe do not fully protect the fair use rights of the scholarly and education communities. Given the lack of wide and deep consensus among CONFU participants on these proposed guidelines, we recommend they not be included in documents transmitted to legislators on Capitol Hill, nor included in any legislative vehicle.

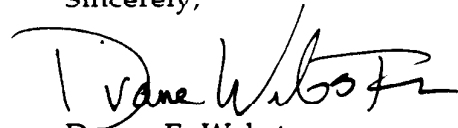
Enclosed please find brief summaries describing specific reasons why ARL cannot endorse the proposed guidelines. We request that this letter and these statements (including our earlier statement on electronic reserves) be included in the final CONFU report.

Fair use is a long-standing doctrine, codified in the 1976 Copyright Act, that allows certain uses of copyrighted materials without infringement. Fair use and related library and educational exemptions are the foundation of the scholarly communication process and allow educational institutions and their individual members to carry out their teaching and research missions. ARL believes our participation in CONFU was critical to ensure that the existing balance between copyright owners and users in the print environment be carried over to the electronic environment.

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ARL is convinced that consensus on the fair use of copyrighted digital works is an important goal and we are working with others within the educational community on a set of principles in this arena. If, however, a more formal process is established that includes all stakeholders, commercial and educational, we would want to participate to help ensure that the implications for fair use and other educational exemptions are fully addressed. ARL believes fair use is a critical element in the balance between the needs of copyright holders and the needs of users and we will continue our efforts to see that it remains a central element in U.S. copyright law.

Sincerely,

A handwritten signature in black ink, appearing to read "Duane Webster", written over a horizontal line.

Duane E. Webster
Executive Director

cc: Cameron Kitchin, Contact, Digital Images Working Group
Lolly Gasaway, Contact, Distance Learning Working Group
Lisa Livingston, Contact, Educational Multimedia Working Group

Enclosures:

Digital Images Fair Use Guidelines: A Summary of Concerns
Distance Learning Fair Use Guidelines: A Summary of Concerns
Educational Fair Use Guidelines for Multimedia: A Summary of Concerns
Electronic Reserves Fair Use Guidelines: A Summary of Concerns



ASSOCIATION OF RESEARCH LIBRARIES

Digital Images Fair Use Guidelines: A Summary of Concerns

Over the past two years and in the context of the Conference on Fair Use (CONFU), the Association of Research Libraries (ARL) has worked with other CONFU participants to develop consensus among rightsholders and users of copyrighted works for fair use rights for libraries and educational organizations in the networked environment. Digital images was one of the five areas identified for the possible development of CONFU guidelines. ARL actively participated in CONFU believing that the process would capture for the digital environment the carefully constructed balance that has been achieved and maintained in the print environment. This fact sheet summarizes the concerns of ARL that resulted in a decision not to endorse the digital images fair use guidelines.

Following the process used for other CONFU draft documents, ARL distributed copies of various drafts of the digital images guidelines to review and secure member comment. At the request of the Digital Images Working Group in August 1996, ARL distributed copies of the August 15, 1996, draft to the membership and received a series of critical responses. ARL responded to the Working Group by submitting a one-page summary of the comments and concerns. That review first identified the following key concerns:

- *lack of balance between the rights of copyright owners and those of users of copyrighted digital images (e.g., the draft appears to go to great lengths to secure the rights of owners with no corresponding assertions about the rights and needs of users, creators, or archiving agencies as they serve society.)*
- *new requirements for educational institutions to comply (e.g., the draft introduces new responsibilities on the educational institution to research copyright status, apply for permissions, and maintain records.)*
- *new restrictions on fair use (e.g., the draft ceded rights that might apply under fair use and suggests that the determination of fair use is limited by a finite period.)*
- *technical and process concerns (e.g., the draft's specificity about network control, coupled with the process of finding the rightsholder, are overly restrictive.)*

Upon release of the *CONFU Interim Report* in December 1996, ARL distributed copies of the final "Proposal for Educational Fair Use Guidelines for Digital Images" and sought recommendation on possible endorsement. Based on the comments received, ARL voted not to endorse the digital images fair use guidelines.

April 30, 1997
Prepared for ARL by Mary E. Jackson
ARL Access & Delivery Services Consultant



ASSOCIATION OF RESEARCH LIBRARIES

Distance Learning Fair Use Guidelines: A Summary of Concerns

Over the past two years and in the context of the Conference on Fair Use (CONFU), the Association of Research Libraries (ARL) has worked with other CONFU participants to develop consensus among rightsholders and users of copyrighted works for fair use rights for libraries and educational organizations in the networked environment. Distance learning was one of the five areas identified for the possible development of CONFU guidelines. ARL actively participated in CONFU believing that the process would capture for the digital environment the carefully constructed balance that has been achieved and maintained in the print environment. This fact sheet summarizes the concerns of ARL that resulted in the decision not to endorse the distance learning fair use guidelines.

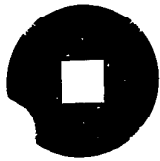
Following the process used for other CONFU draft documents, ARL distributed copies of various drafts of the distance learning guidelines to review and secure member comment. The following concerns were identified:

- *the guidelines are limited to live, interactive courses and therefore do not address the variety of teaching methods in widespread use*
- *new restrictions on repetitive use of copyrighted works (e.g., the limitation to transmit a copyrighted work only once and the requirement to obtain permission for subsequent uses.)*
- *new requirements that the institution implement technological limitations to prevent copying (e.g., the requirement to limit reception to a classroom or other site where secure reception can be controlled by the institution.)*
- *more limited interpretation of fair use (e.g., the draft appears to restrict the principle of fair use.)*

Upon release of the *CONFU Interim Report* in December 1996, ARL distributed copies of the final "Proposal for Educational Fair Use Guidelines for Distance Learning" and sought recommendation on possible endorsement. The concerns noted above were again identified and, based on comments received, ARL voted not to endorse the distance education fair use guidelines.

April 30, 1997

Prepared for ARL by Mary E. Jackson
ARL Access & Delivery Services Consultant



ASSOCIATION OF RESEARCH LIBRARIES

Educational Fair Use Guidelines for Multimedia: A Summary of Concerns

In July 1996, the Consortium of College and University Media Centers (CCUMC) completed a two-year process to develop fair use guidelines for the creation of multimedia projects by educators and students. The guidelines, "Educational Fair Use Guidelines for Multimedia," seek to clarify what constitutes 'fair use' of copyrighted materials in an educational context. This fact sheet summarizes the concerns of the Association of Research Libraries (ARL) and other organizations that rejected the CCUMC guidelines as overly restrictive.

CCUMC developed the guidelines with representatives from educational organizations, library associations, and copyright proprietary groups. Educational organizations and library association representatives were active participants and raised many of the concerns noted below in working group meetings. In spite of many long discussions over the course of the development of the guidelines, it is the opinion of many in the educational community that the final guidelines did not address these concerns and, therefore, the guidelines do not maintain the balance between users and owners of copyrighted materials.

As of early 1997, several organizations issued statements opposing the guidelines including the Association of Research Libraries, the American Library Association, the National Association of State University and Land Grant Colleges, and a coalition led by the National School Boards Association (NSBA, National Association of Secondary School Principals, National Association of School Administrators, National Education Association, U.S. Catholic Conference, National Association of Independent Schools). The concerns raised by these constituencies include several common themes:

- The guidelines define fair use by imposing strict and narrow portion limitations. Three examples are cited:
 - 10% or 3 minutes, whichever is less, of a motion media
 - 10% or 30 seconds, whichever is less, of music
 - Retention of student projects for 2 years or less
- Recognizing that user rights are not unlimited, these portion limitations still unduly restrict instructional creativity and the development of in-depth multimedia applications for distance education initiatives.

- These strictly-articulated quantitative limitations may establish untenable precedents that may narrow the interpretation of fair use, and thus will not fully protect the public's fair use rights.

- The guidelines appear to make teachers and administrators legally responsible for the activities of students.

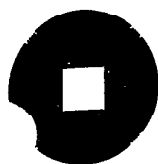
These concerns with the proposal are the basis for ARL's decision not to endorse the Educational Fair Use Guidelines for Multimedia.

February 6, 1997; revised April 30, 1997

Prepared for ARL by

Mary E. Jackson

ARL Access & Delivery Services Consultant



ASSOCIATION OF RESEARCH LIBRARIES

Electronic Reserves Fair Use Guidelines: A Summary of Concerns

Over the past two years and in the context of the Conference on Fair Use (CONFU), the Association of Research Libraries (ARL) has worked with other CONFU participants to develop consensus among rightsholders and users of copyrighted works for fair use rights for libraries and educational organizations in the networked environment. Electronic reserves was one of the areas identified for the development of CONFU guidelines. ARL actively participated in CONFU believing that the process would capture for the digital environment the carefully constructed balance that has been achieved and maintained in the print environment. This fact sheet summarizes the concerns of ARL that resulted in the rejection of the electronic reserve guidelines.

While some CONFU participants support a March 5, 1996, draft of the electronic reserve guidelines as practical guidance for one possible model for the digital future, ARL believes that the document appears to narrow the fair use rights of teachers, librarians, and student users of copyrighted materials by proposing a maximum limit rather than a minimum threshold.

Comments from the ARL membership were solicited on several early drafts developed by the CONFU Working Group, beginning with a membership-wide call for comment in July 1995. That review first identified the following key concerns:

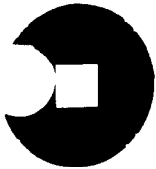
- access restricted to students registered in the class (e.g., narrowing current access that serves all students in the institution)
- very restrictive technological limits on access to materials (e.g., limiting access from dedicated workstations in the library)
- strict limitations on the proportion of course materials included (e.g., not all course materials assigned for reserve could be included)
- strict limitations on the type of material (e.g., supplemental readings only, required readings could not be included)
- electronic access limited to one term (e.g., permission required for reuse)

These concerns, along with others identified by other CONFU participants, including serious reservations by the publisher representatives, were sent to the Electronic Reserves Working Group for consideration. Compromises were developed and discussed but ultimately the Working Group reached an impasse at the end of 1995. Subsequent efforts in 1996 by a small group representing the scholarly and academic community also failed to reach consensus. Also during the year, two major publisher groups formally rejected the guidelines (Association of American Publishers and Software Publishers Association).

In each set of deliberations, the concerns about how the guidelines narrow fair use were not, in the view of ARL, satisfactorily resolved. This process, along with a message from the commercial publishing community that adherence to the practices proposed in the document would be no assurance against infringement litigation, led to ARL's decision in October 1996 to reject the guidelines.

At the November 25, 1996, plenary session of the Conference on Fair Use, participants concluded that there was insufficient support for the March 5, 1996, draft. CONFU participants agreed that the March draft would not be submitted for consideration as a proposal for CONFU fair use guidelines or included in the final CONFU report.

February 14, 1997
Prepared for ARL by Mary Jackson
ARL Access & Delivery Services Consultant



ASSOCIATION OF RESEARCH LIBRARIES

30 May 1996

Lisa Livingston, Chairperson
Government Regulation and Public Policy Committee, CCUMC
Director, Instructional Media
City College/City University of New York
138th Street at Convent Ave.
New York, NY 10031

Dear Lisa:

Copies of the draft "Educational Fair Use Guidelines for Multimedia" were distributed to the ARL Board of Directors, members of the ARL Copyright Working Group, and selected other directors of ARL member institutions for comment prior to the May 14 - 17, 1996 Membership Meeting. A series of practical as well as philosophical concerns with the current draft were articulated.

At its meeting on May 17, 1996, the Board of Directors formally voted not to endorse the multimedia guidelines. This action was based in part on the concerns of the unduly restrictive quantitative limitations characteristic of the CCUMC guidelines that reflect a too narrow interpretation of fair use. The Association is also greatly concerned that the CCUMC multimedia guidelines do not effectively support the emerging distance education initiatives underway and being planned by the higher education community in a variety of settings.

In addition, I might also add our concern about the current version of the guidelines including a list of organizations participating in the development of the guidelines rather than a list of endorsing organizations. We share the concerns of others who believe that the participant list implies that all organizations support the guidelines. Therefore, we strongly encourage that any future versions of the guidelines include just the list of endorsing organizations.

Mary Jackson, ARL's representative to the CCUMC meetings, has praised your strong support for and dedication to the effort to develop multimedia guidelines. I regret that ultimately ARL is not able to endorse the CCUMC multimedia guidelines.

Sincerely,

Duane E. Webster
Executive Director

cc: ARL Board of Directors
ARL Copyright Working Group